No. 126, Original

In The

Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

NEBRASKA'S BRIEF IN RESPONSE TO BRIEFS OF KANSAS AND UNITED STATES IN OPPOSITION TO NEBRASKA'S MOTION TO DISMISS

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SUMMARY OF ARGUMENT[1]

Nebraska's Motion to Dismiss presents a question of law: Does the Republican River Compact restrict the consumption of groundwater? This question must be answered based upon the intention of the Compact states as reflected in the language of the Compact agreement. The Compact should be enforced according to its terms and not judicially amended to make it more "equitable" as advocated by Kansas.

In response to Nebraska s Motion to Dismiss, Kansas reveals that what she seeks is not an enforcement of the Compact pursuant to the plain meaning of its terms but a new equitable apportionment restricting the use of groundwater. The Compact does not, and was never intended to, restrict the use of groundwater from the Ogallala aquifer (or formation). "The High Plains aquifer consists mainly of hydraulically connected geologic units

The Ogallala Formation, which underlies 134,000 square miles, is the principal geologic unit of the High Plains aquifer The High Plains aquifer contains about 3.25 billion acre-feet of drainable water. About 66 percent of the water in storage is in Nebraska [M]ost of the depletion has occurred in Kansas and Texas . 29 million acre-feet of depletion in Kansas." Edwin D. Gutentag et al., *Geohydrology of the High Plains Aquifer in Parts of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, South Dakota, Texas and Wyoming* (USGS Professional Paper 1400-B at 1) (1984).

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[1] For purposes of this brief, all terms used herein are as previously defined in Nebraska's Brief in Support of Motion to Dismiss.

Kansas has greatly depleted its reserves of the Ogallala aquifer and now hopes to increase the amount of water available to Kansas by preventing Nebraska's use of the aquifer. It is using this lawsuit as a means of accomplishing its objective. Kansas is well aware the Ogallala aquifer underlies eight states, each of which enjoys rights to the groundwater. Kansas informed this Court years before this litigation arose: "[T]here is a *de facto* equitable apportionment of ground water in the Ogallala Aquifer [with] [e]ach state overlying the aquifer allocat[ing] for beneficial use only that quantity of ground water which can be diverted within the state." *See* Brief of Amici Curiae, States of Colorado, Kansas, et al. at 10; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). Nebraska's use of groundwater is in compliance with this eight-state *de facto* equitable apportionment.

In her brief, Kansas claims it seeks to restrict the use of groundwater that is "hydraulically connected" to the Republican River, including that found in the Ogallala aquifer. The Compact provides no authority to restrict the use of either Ogallala or "hydraulically connected" groundwater. Kansas acknowledges that groundwater is not apportioned by the Compact, but argues the term "virgin water supply" in the Compact *implicitly* restricts Nebraska from consuming groundwater from the Ogallala aquifer if it is "hydraulically connected" to the Republican River. This is an apportionment by another name. It is also not authorized by the Compact. The terms "groundwater" and "hydraulically connected" do not exist in the Compact.

The Compact states entered the Compact for the purpose of creating flood control and surface water irrigation

projects in the Republican River Basin. *See* Brief of United States at 3. The Compact apportions 478,900 acre-feet of surface flows annually. *See* Compact Article IV. The Compact was clearly not intended to regulate or restrict the use of the approximately 3,200,000,000 (3.2 billion) acre-feet of groundwater found in the eight-state aquifer system.

It is illogical to conclude that the Compact states intended to restrict groundwater use in 1942 because none of the Compact states had statutes that restricted the use of groundwater at the time the Compact was entered. Yet Kansas asks this Court to declare that the Compact states and Congress intended, without using the word "groundwater" or providing any mechanism for groundwater regulation, to create groundwater use restrictions that the Compact states had not given to their state water regulators by state legislation. This Court recognized that the Compact states did not regulate groundwater by means of the Compact in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 959 (1982).

When in doubt about contract interpretation, a court gives great weight to the construction the parties have given to the contract. Here the parties, for nearly 60 years, have used unanimously adopted formulas to calculate the water that is subject to the Compact. These formulas count defined alluvial water near the river as part of surface flow for purposes of administering the Compact. Kansas asks this Court to set aside those formulas and impose instead a new equitable apportionment of all "hydraulically connected" groundwater.

Compacts are enforced according to their terms, not on equitable considerations. However, it should be noted that official Compact data shows that over the past fifty years, Kansas has received from Nebraska substantially more water than was allocated to her under the Compact. At the same time, Kansas has never used all of the water delivered to her by Nebraska. (*See* Nebraska's Brief in Opposition to Kansas' Motion for Leave to File Bill of Complaint at 10-13).

In the final analysis, this is not an action to enforce the Compact as written and as historically interpreted by the Compact states. Instead, this action is an effort by Kansas to have this Court re-write and expand the Compact. This Court should decline Kansas' request to do so. Nebraska's Motion to Dismiss should be granted.

ARGUMENT

I. THE REPUBLICAN RIVER COMPACT DOES NOT RESTRICT A STATE'S CONSUMPTION OF GROUNDWATER

As a matter of law, the Compact does not restrict consumption of groundwater found in the Ogallala aquifer for the following reasons: (1) the Compact, by its plain and unambiguous terms, does not apportion, allocate or restrict the consumption of groundwater; (2) this Court and the Attorneys General of each of the Compact states have previously interpreted the Compact as an agreement apportioning surface water and not Ogallala groundwater; and (3) the Supreme Courts of the three Compact states all previously failed to recognize the Compact as a

source of state or federal law restricting the consumption of Ogallala groundwater.

A. The Compact Is a Contract and Must Be Construed According to Its Terms.

Kansas and the United States acknowledge the language of the Compact does not apportion groundwater among the Compact states. *See* Brief for the United States at 15; Kansas' Brief at 22. Nevertheless, they argue the Compact apportions that part of the groundwater in the eight-state Ogallala aquifer that is "hydraulically connected" to the Republican River. *See* Brief for the United States at 16; Kansas' Brief at 22. The "plain meaning" offered by the United States and Kansas is anything but plain. The words "hydraulically connected" do not appear in the Compact. Likewise, the term "groundwater" does not appear in the definition of "virgin water supply." The position Kansas advocates is a new equitable apportionment of the Ogallala aquifer. If the Ogallala aquifer is hydraulically connected to the Republican River, arguably any consumption of groundwater within the eight-state region would be subject to use restrictions.[2] The three-state Compact was not intended to, and

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[2] For example, under the Kansas theory, if Nebraska farmers consumed the full amount of Nebraska's Compact allocation through direct surface water diversions, municipalities and other farmers would not be permitted to use a single drop of the two billion acre-feet of groundwater found in Nebraska's portion of the Ogallala Aquifer even if Kansas received the full amount of her apportionment. Likewise, under Kansas' theory, if out of basin Ogallala groundwater would

could not, restrict the activities of five states not parties to the Compact. The Compact was not intended to and simply did not allocate groundwater. The very breadth of the potential impact of Kansas' interpretation belies her contention that the parties intended to allocate Ogallala groundwater. To attach such a broad scope of regulation to the Compact would have required a clearly expressed meeting of the minds of the parties. No such expression is found in the Compact.

As noted by the United States as Amicus Curiae, the Compact states entered into the Compact "to apportion an interstate stream and to provide the basis for orderly planning and development of federal flood control and irrigation projects." *See* United States Brief at 1. These federal projects involve surface water only. There was no need or demand for the Compact to encompass the 2 billion acre-feet of water stored in the ground under Nebraska.

The Compact specifically defers to the laws of each state to enforce the allocations made in the Compact, stating: "use of the waters hereinabove allocated shall be subject to the laws of the State, for use in which the allocations are made." (Compact, Art. IV). At the time the Compact was entered, none of the Compact states permitted the regulation of Ogallala groundwater. Relative to groundwater regulation, Article IV would have been meaningless at the time the Compact was adopted. Furthermore, had the three states intended to create the

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otherwise ultimately find its way to the basin, use of that groundwater outside the basin would have to be counted against Nebraska.

authority to regulate groundwater, some legislative debate would have certainly occurred. None of the three state legislative bodies or Congress ever discussed the regulation or apportionment of Ogallala groundwater. Even the Kansas Supreme Court failed, on two separate occasions, to recognize the Compact as authority to restrict or control groundwater use. *See State ex rel. Peterson v. Kansas State Board of Agriculture*, 158 Kan. 603, 149 P.2d 604 (1944), and *State ex rel. Emery v. Knapp*, 167 Kan. 546, 207 P.2d 440 (1949).

Kansas and the United States rely heavily on an expansive definition of the term "virgin water supply" to support their claims. To defend their definition of "virgin water supply" they offer only anecdotal information as attachments to their briefs. As an initial matter, anecdotal material cannot overcome the plain meaning of the language of the Compact[3] and is barred by the parole

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[3] Disregarding the legal basis of Nebraska's motion, the United States, as Amicus Curiae, seeks to direct the issue to an argument of equity. Specifically, the United States argues that any stream flow decline would be "inequitable, and harmful to investment-backed expectations of the downstream States, if an upstream State could augment its apportionment by simply intercepting a component of the allocated stream flows before those flows are measured." *See* Brief for the United States at 12. The United States, however, fails to recognize that "investment-backed expectations" in Kansas cannot be harmed if Kansas receives the full amount of its apportionment. Kansas has consistently received more water than was allocated to her and has been unable to put to beneficial use almost all the water that has been delivered to her. (*See* Nebraska's Brief In Opposition to Kansas' Motion For Leave to File Bill of Complaint at 10-14). The United States also ignores the impact of its own actions within the Basin. According to the Bureau of Reclamation, "Soil and

evidence rule[4]. Furthermore that anecdotal material ignores the only parties who could bind the States to a Compact: the Compact states' legislatures and Congress. There is no evidence to indicate that these entities believed they were authorizing what would have been a revolutionary regulation of water use and/or groundwater property rights.

By contrast, Nebraska and Kansas, with the approval of Congress, have demonstrated their ability to include groundwater in compacts when they so intended. The Blue River Compact between Kansas and Nebraska became law in 1971. *See* 86 Stat. 193. That compact specifically provides for the regulation of groundwater in Nebraska to protect surface flows in Kansas. If Kansas,

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water conservation practices (residue management, terracing, and farm ponds) contribute the largest depletions to the basin water supply". (See *Resource Management Assessment: Republican River Basin*, U.S. Dept. of the Interior, Bureau of Reclamation (1996).) These conservation practices have been widely promoted and funded by the United States for decades. Most importantly, the United States ignores the inequities created by its position, to "investment-backed" farmers in Nebraska who have, for the last fifty years, relied upon the plain language of the Compact. Language that has been previously interpreted by this Court and the supreme courts of all the Compacting states, as providing no authority for regulating groundwater property rights.

[4] The anecdotal material submitted as exhibits, addendums or appendices by Kansas, Colorado and the Amicus Curiae are not relevant at this point in the proceeding. Nebraska hereby preserves all objections concerning the admissibility of such material as evidence. Nebraska further preserves all objections relating to the opinions, conclusions, qualifications or designations of persons purported to be expert witnesses.

Nebraska and Congress believed the Republican River Compact implicitly permitted the regulation of groundwater by the definition of "virgin water supply", it would have been unnecessary to expressly address groundwater by definition in the Blue River Compact[5]. More importantly, Kansas' argument would reach the anomalous result of imposing greater restrictions on groundwater use under the Republican River Compact where the term "groundwater" is absent than under the Blue River Compact where it is specifically addressed.

Finally, this Court's holding in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), demonstrates that Congressional intent to regulate groundwater use cannot be inferred or implied. In their dissent in *Sporhase*, Chief Justice Rehnquist and Justice O'Connor considered whether Congress could regulate the use of groundwater within the Republican Basin if groundwater overdraft were to occur. (Bear in mind there was considerable overdraft in Kansas but almost none in Nebraska.[6]) After reviewing arguments by the Attorneys General of all the Compact states, the Chief Justice and Justice O'Connor

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[5] Article V of the Blue River requires Nebraska to regulate "irrigation wells in the alluvium and valley side terrace deposits within one mile of the thread of the river." (*See* 86 Stat. 193).

[6] "The volume of water in storage in the aquifer has decreased about 166 million acre-feet since ground-water development began. Most of the depletion has occurred in Kansas and Texas: about 114 million acre-feet of depletion in Texas and 29 million acre-feet of depletion in Kansas." Edwin D. Gutentag, et al., *Geohydrology of the High Plains Aquifer in Parts of Colorado, Kansas, Nebraska, New Mexico, Oklahoma, South Dakota, Texas and Wyoming* (USGS Professional Paper 1400-B) (1984).

found, "It is therefore wholly unnecessary to decide whether Congress could regulate ground-water since Congress has not undertaken such regulation." *Id.* at 962.

B. Prior Decisions of this Court and the Actions of the Parties Demonstrate the Compact Does Not Restrict the Consumption of Ogallala Groundwater.

1. *Sporhase*.

Kansas argues her position in *Sporhase* is "consistent with her position that the Compact restricts consumption of groundwater." *See* Kansas' Brief at 27. Kansas' argument is mystifying. *Sporhase* involved irrigation wells in the Republican River Basin located approximately half a mile from a tributary of the Republican River named in the Compact. Groundwater pumped by those wells was transported from Nebraska to Colorado for irrigation purposes. In its brief as Amicus Curiae in *Sporhase*, Kansas failed to argue or mention that the withdrawal of groundwater could have Compact implications. Indeed, Kansas strenuously argued the opposite proposition: that there were no compacts governing the use of Ogallala groundwater: "[T]here is a *de facto* equitable apportionment of groundwater in the Ogallala Aquifer. Each state overlying the aquifer allocates for beneficial use only that quantity of ground water which can be diverted within the state." *See* Brief of Amici Curiae, States of Colorado, Kansas, et al. at 10; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). Kansas went so far as to warn this Court that any infringement on state authority to regulate groundwater would likely result in a new "equitable

apportionment, by decree or compact" to deal with Ogallala groundwater. *Id.* at 10.

To be consistent with its present position, Kansas should have argued in *Sporhase* that the wells could be regulated under the statutory authority of the Compact rather than claim the groundwater was subject to a "*de facto* apportionment." Kansas, however, did not mention the Compact to this Court even though the *Sporhase* wells are the very ones of which she now complains. It bears repeating that this Court specifically examined and rejected the Compact as a possible restriction on the beneficial consumptive use of Ogallala groundwater.

The position advocated by Kansas today is diametrically opposed to the one she argued in *Sporhase*. The Attorneys General of Nebraska, Kansas and Colorado each agreed the Compact did not impose restrictions on the exercise of property rights to Ogallala groundwater. This Court accepted those representations.

2. The Actions of the Republican River Compact Administration.

The Republican River Compact Administration (the "RRCA") is comprised of engineers charged by their respective Compact states to "administer the public water supplies." (Compact, Art. IX). These individuals do not have authority to independently create substantive federal or state law. The creation of federal and state law remains the province of Congress and each state's legislative body, respectively. To the extent the RRCA purported to establish Compact formulas, those formulas could not

legally exceed the scope of authority created by the Compact itself and any then existing substantive federal or state law. Article IX of the Compact provides that "Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact." As previously discussed, none of the Compact States had statutes that permitted the regulation of property rights associated with the use of Ogallala groundwater at the time the Compact was enacted. Furthermore, none of the Compact states' Supreme Courts or this Court interpreted the Compact to create such authority. To the extent individuals comprising the RRCA adopted formulas that suggest groundwater could be regulated in a manner similar to surface water, the RRCA exceeded its authority.

Nebraska recognizes that the practice of the parties to the Compact for nearly forty years has been to include certain "wells in the alluvium" in determining the water supply apportioned by the Compact. Nebraska, however, equally recognizes that the practice of the parties over those same forty years has been to exclude Ogallala groundwater. The statements adopted by the RRCA, and followed for forty years, specifically indicate Ogallala groundwater ("table-land wells") is not included in the Compact water supply. Likewise, those same RRCA members recognized that there was no basis outside the Compact for restricting consumptive use of nonalluvial groundwater, as evidenced by their statement that "considerably more research and data" was necessary before any discussion of the impact of those wells, if any, should take place[7].

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[7] Had the parties conducted comprehensive research concerning Ogallala groundwater, they would have discovered

The position of the RRCA reaffirms both the historical absence of intent in the Compact to restrict nonalluvial groundwater use and the necessity that such a restriction be evidenced by an explicit "meeting of the minds" of the Compact states. Likewise, the RRCA's unequivocal statement of exclusion contradicts and nullifies Kansas' claim of inclusion by implication. Rather than supporting the inclusion of nonalluvial groundwater in the Compact by implication and thereby restricting nonalluvial groundwater use, the actions and statements of the Compact states since adoption of the Compact, have clearly expressed the absence of such restriction within the plain meaning of the Compact.

3. This Court's Decisions in *Kansas v. Colorado*, 514 U.S. 673 (1995), and *Texas v. New Mexico*, 482 U.S. 124 (1987), Are Inapplicable to the Present Matter.

The United States and Kansas argue this Court's holdings in *Kansas v. Colorado*, 514 U.S. 673 (1995), and *Texas v. New Mexico*, 482 U.S. 124 (1987), somehow bind the parties in this action because the Compact contains language similar to that found in the Arkansas and Pecos River compacts. They are wrong.

First, the Court's holdings in *Kansas v. Colorado*, 514 U.S. 673 (1995), and *Texas v. New Mexico*, 482 U.S. 124 (1987), are factually distinguishable, and therefore not applicable to the issue before the Court in this case.

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that regulation of groundwater could not be accomplished under existing state laws.

Neither Colorado in *Kansas v. Colorado*, nor New Mexico in *Texas v. New Mexico* argued, plead or otherwise disputed the issue of whether groundwater was regulated by the compacts. Furthermore, the opinions of this Court are silent as to whether non-alluvial groundwater was subject to the Pecos and Arkansas River compacts. *Kansas v. Colorado* and *Texas v. New Mexico* are simply not compatible with the matter presently before the Court.

Second, the Arkansas River Compact and the Pecos River Compact expressly provide that they do not establish any "general principles" or "precedent" relative to other interstate streams (i.e. the Republican River). Article VII of the Arkansas River Compact states: "**This Compact establishes no general principle or precedent with respect to any other interstate stream.**" (emphasis added) (*See* 63 Stat. 147). Similarly Article XIII of the Pecos River Compact states: "**This Compact shall not be construed as establishing any general principle or precedent applicable to other interstate streams.**" (emphasis added) (*See* 63 Stat. 161).

Finally, the Arkansas and Pecos River Compacts both include provisions that expressly prohibit any future material depletion to the surface flows.[8] *See Kansas v.*

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[8] Article IV-D of the Arkansas River Compact states: "This Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado and Kansas *Provided*, that the waters of the Arkansas River . . . **shall not be materially depleted in usable quantity or availability for use** by such future development or construction." Article III(a) of the Pecos River Compact provides: "**New Mexico shall not deplete** by man's activities the flow of the Pecos River at the New Mexico-Texas state line

Colorado, 514 U.S. 673, 679 (1994); *Texas v. New Mexico*, 462 U.S. 554, 559 (1983). These "thou shalt not" provisions are not found in the Republican River Compact. Indeed, the Republican River Compact was entered to *promote* the depletion of surface flows in order to maximize the "beneficial consumptive use" of the river. Unlike the Arkansas or Pecos rivers, the water of the Republican River was *intended* to be used and depleted after the Compact was entered. This was the central purpose of the Compact. *See* Compact, Article II ("Beneficial consumptive use is the basis and principle upon which the allocations of water . . . are made.") Substantial amounts of water continue to flow into Kansas in excess of her apportionment and in excess of her ability to beneficially consume. *See* Nebraska's Brief in Opposition to Kansas' Motion for Leave to File Bill of Complaint at 10-13.

II. KANSAS AND THE UNITED STATES ADVOCATE A JUDICIAL MODIFICATION OF THE COMPACT.

Kansas, Colorado and the United States agree with Nebraska that the Compact does not apportion Ogallala groundwater. *See* Kansas' Brief at 22; Colorado's Brief at 23; and Brief for the United States at 15. Kansas and the United States, however, claim that while Ogallala groundwater is not apportioned, the consumption of Ogallala groundwater is necessarily restricted to the amount of Nebraska's apportionment because any consumption of hydraulically connected groundwater must

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below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition."

eventually impact surface water flows in a like amount. *See* Kansas' Brief at 22, and Brief for the United States at 15. The distinction offered by the United States and Kansas is ultimately a new equitable apportionment under the guise of Compact enforcement. Under either characterization, Nebraska farmers would be prohibited from making beneficial use of 2 billion acre-feet of groundwater for which they hold property interests. No such direct or indirect apportionment occurred by the adoption of the Compact.

A. As a Matter of State Law, Groundwater Use Is Not Restricted by the Compact.

Kansas correctly notes that only this Court possesses the authority to determine interstate controversies. *See* Kansas Brief at 33. On that basis, Kansas argues that the holding of her State Supreme Court in *State ex rel. Peterson v. Kansas State Board of Agriculture*, 158 Kan. 603, 149 P.2d 604 (1944), is irrelevant to whether groundwater rights are restricted by the Compact. Kansas is in error. The interpretations of the Compact by the highest courts of the Compact states, is persuasive evidence of the intentions of the Compact states. Determinations by the Compact states' courts are also binding on those states until otherwise determined by this Court.

In *State Board of Agriculture*, the Kansas Supreme Court held the State of Kansas possessed no authority to regulate the use of groundwater. The brief written by the Kansas Attorney General in *State Board of Agriculture* is 127 pages in length and canvassed Kansas' law for authority permitting the regulation of groundwater. The

brief did not limit the issue of groundwater regulation to the Equus Beds, as Kansas would have this Court believe. In those 127 pages, the Kansas Attorney General did not mention or claim the Compact conveyed any state or federal authority to regulate groundwater. Despite the independent research of the Kansas Supreme Court, they too failed to conclude the Compact provided any authority to restrict groundwater use. As previously noted, the Kansas Supreme Court held: "No statute cited to us, and none which we have found by our own research, authorizes the defendants, or any of them, to regulate, allocate or distribute, or otherwise interfere with the use and consumption of underground waters." *Id.* at 611.

In response to the Kansas Court's holding in *State Board of Agriculture*, Kansas Governor Andrew F. Schoeppel appointed a committee to report on the laws of Kansas relating to the appropriation of water. The Chairman of that committee was George S. Knapp. On December 28, 1944, the Committee submitted its report, "The Appropriation of Water for Beneficial Purposes" to Governor Schoeppel.[9] That Report contains an extensive comparison between Nebraska and Kansas water laws and repeated from *State Board of Agriculture* that, "No statute authorizes the Division of Water Resources of the State Board of Agriculture or its chief engineer to regulate, allocate or distribute, or otherwise interfere with the use and consumption of underground waters." *Id.* at 39. Significantly, the co-author of the report, George S. Knapp, served as the Compact negotiator for the State of Kansas

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[9] The Report served as the basis for the Kansas Water Appropriation Act of 1945.

only two years earlier. Despite his intimate and recent experience in negotiating the Compact, Mr. Knapp did not mention the Compact or its alleged authority to regulate groundwater. Indeed, the report focuses on legislation that would create the authority to regulate groundwater. Certainly Mr. Knapp would have at least mentioned the Compact as an example of state authority to regulate groundwater had he so believed.

In 1949, the Kansas Supreme Court had its first opportunity to review the Kansas Water Appropriation Act of 1945 in *State ex rel. Emery v. Knapp*, 167 Kan. 546, 207 P.2d 440 (1949). While Kansas would have this Court ignore *Knapp*, the holding of the Kansas Supreme Court demonstrates that indeed the Compact, as a matter of Kansas law, did not create any authority to regulate groundwater. In upholding the constitutionality of the Kansas Water Appropriation Act of 1945, the *Knapp* court noted that the Compact was entered "for the beneficial consumptive use of the waters of the Republican River." *Id.* at 444. The court then reaffirmed its holding in *State Board of Agriculture*, 158 Kan. 603, 149 P.2d 604, that no statute (i.e., the Compact) or case law authorized any Kansas official to regulate, allocate or distribute groundwater. *Id.* at 444-45. Had the Kansas Supreme Court viewed the Compact as a source of authority to regulate groundwater property interests, it would have so indicated in *Knapp*. Additionally, had there been any intention on the part of Kansas to permit the regulation of groundwater rights via the Compact, Mr. Knapp, the Kansas Attorney General, its Governor and its Supreme Court failed to ever express that intention.

Like the Kansas Supreme Court, Nebraska and Colorado Supreme Courts had numerous opportunities to determine whether the Compact created the authority to limit the exercise of groundwater property rights. The Colorado Supreme Court expressly rejected any notion that rights to use Ogallala groundwater were subject to the Compact in *Pioneer Irrigation Districts v. State of Colorado*, 658 P.2d 842 (Colo. 1983). And the Nebraska Supreme Court has never accepted the view that the Compact regulated the use of Ogallala groundwater.

In *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), the Nebraska Supreme Court examined the authority of the State to regulate groundwater withdrawn from wells located less than one mile from a tributary of the Republican River. While the Nebraska Supreme Court recognized the authority of state officials to regulate the transportation of groundwater across state lines, it did not recognize the Compact as the source of that authority. More importantly, and as more fully discussed above, when *Sporhase* was appealed to this Court, this Court found no state or congressional act providing for the regulation for groundwater.

III. NEBRASKA v. WYOMING, No. 108 ORIGINAL

Oddly, Kansas argues that Nebraska's position in the present litigation is inconsistent with her position in *Nebraska v. Wyoming*, No. 108 Original, which involves the North Platte River. While Nebraska's position in *Nebraska v. Wyoming* is irrelevant to the present proceeding, the Court should know that Kansas' argument is in error.

First, it should be recognized that the two cases are fundamentally distinct. The *Nebraska v. Wyoming* action arises from an equitable apportionment while the matter presently before the Court arises from a contract. Kansas' assertion is premised upon its interpretation of the equitable apportionment made by this Court in *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Kansas, however, cites explicitly to the October 1945 Decree entered by the Court but not the Court's earlier Opinion in June 1945 that expressed and contained the equitable apportionment. The distinction is important because in the present *Nebraska v. Wyoming* proceeding, Nebraska is seeking to enforce the equitable apportionment expressed by this Court in the June 1945 Opinion. In that Opinion, the Court specifically considered limited groundwater use in making the apportionment of the already over-appropriated North Platte River. It is significant, that Nebraska's claims in *Nebraska v. Wyoming* involve non-Ogallala groundwater. To the extent that Nebraska seeks relief in accordance with the June 1945 Opinion, it does so in a manner that does not impact the multistate Ogallala aquifer system.

In contrast to *Nebraska v. Wyoming*, Nebraska has moved to have Kansas' groundwater claims dismissed as a matter of law because the legislative bodies never intended groundwater rights to be regulated as part of the agreement. As explained earlier, the exercise of groundwater rights cannot be restricted under the terms of the present Compact. Nebraska believes that Kansas' efforts are aimed at rewriting the Compact contrary to the intentions of the parties at the time the Compact was entered.

Interestingly, Kansas fails to mention that the United States presently opposes the consideration of groundwater use within the *Nebraska v. Wyoming* proceeding. Contrary to the position it takes in this case, the United States has concluded that if **alluvial** or **nonalluvial** groundwater use impact surface supplies in the North Platte River, Nebraska is not entitled to relief based upon the June 1945 Opinion and the language of the North Platte Decree[10]. The scientific principles so firmly asserted by the United States in this action are apparently inapplicable to the North Platte River. To the extent it is relevant, the United States, not Nebraska, is pursuing an inconsistent position.

CONCLUSION

Despite her denials, Kansas is pursuing a new equitable apportionment of groundwater through this proceeding. Kansas' arguments are not supported by the language of the Compact, the decisions of this Court or

[10] The United States has actually taken three different positions on this issue during the course of the proceeding. See Reply Memorandum for the United States on Motions of Nebraska and Wyoming to File Amended Pleadings (1994) at 2; Supplemental Memorandum of the United States on Proposed Amended Claims of Wyoming and Nebraska (1994) at 2; and Response of the United States to the State of Wyoming's Motion for Extension of Time to File Defensive Case Disclosures and the State of Nebraska's Motion to Bifurcate Proceedings (1998) at 9.

the Supreme Courts of Kansas, Nebraska or Colorado. Nebraska's Motion to Dismiss should be granted.

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